Supreme Court, U.S.
FILED
JAN 28 1999
CLERK

No. 98-867

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

HAROLD R. CLAGG, *et al.*,
on behalf of himself and all others similarly situated,

Petitioners,

vs.

BAYCLIFFS CORPORATION, *et al.*,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE STATE OF OHIO

BRIEF IN OPPOSITION FOR RESPONDENTS BAYCLIFFS CORPORATION AND JOHNSON'S ISLAND, INC.

JOHN D. BROWN
Counsel of Record
ROBERT A. BRINDZA
MICHELLE ARENDT
KELLEY, McCANN
& LIVINGSTONE, LLP
Attorneys for Respondents Baycliffs Corporation and Johnson's Island, Inc.
3500 BP Tower
200 Public Square
Cleveland, Ohio 44114-2302
(216) 241-3141

150043

Counsel Press LLC
FORMERLY LUTZ APPELLATE SERVICES
(800) 274-3321 • (800) 359-6859

2088

STATEMENT PURSUANT TO RULE 29.6

Neither corporate respondent has any parent companies or nonwholly owned subsidiaries.

TABLE OF CONTENTS

	Page
Statement Pursuant to Rule 29.6	i
Table of Contents	ii
Table of Cited Authorities	iii
Statement of the Case	1
A. Statement Of Facts.	1
B. The Underlying Proceedings.	4
Reasons for Denying the Writ	5
I. The Court Should Not Grant A Writ Of Certiorari As Petitioners' Claims Are Moot Because The Act Sought To Be Enjoined Has Occurred.	5
II. This Court Should Not Grant A Writ Of Certiorari Because The State Did Not Define Away Or Otherwise Deprive Petitioners Of Property Rights Protected Under The Fifth And Fourteenth Amendments.	8
III. This Court Should Not Grant A Writ Of Certiorari Because The Ohio State Courts And Statutes Involved In This Land-Use Decision Provided Petitioners Appropriate Due Process Protections.	12
Conclusion	15

TABLE OF CITED AUTHORITIES

Page

Cases:

Arizonans for Official English v. Arizona, 520 U.S. 43 (1997) 7

Arnett v. Kennedy, et al., 416 U.S. 134 (1974) 13

A.S.D. Securities, Inc. v. J.H. Bellows Co., 48 Ohio App. 101, 192 N.E. 472 (Ottawa 1933) 9

Board of Regents of State Colleges v. David F. Roth, 408 U.S. 564 (1972) 13

Cleveland v. Shaker Heights, 30 Ohio St. 3d 49, 507 N.E. 2d 323 (1987) 9

Cleveland Bd. of Edn. v. Loudermill, 470 U.S. 532 (1985) 13

Cookston v. Box, 109 Ohio App. 531, 160 N.E. 2d 327 (Cuyahoga 1959) 9

DeFunis v. Odegaard, 416 U.S. 312 (1974) 5

Eastland Woods v. Tallmadge, 2 Ohio St. 3d 185, 443 N.E. 2d 972 (1983) 9

Gardner v. City of Baltimore Mayor and City Council, 969 F.2d 63 (4th Cir. 1992) 12, 13

Cited Authorities

	Page
Harris v. City of Houston, 151 F.3d 186 (5th Cir. 1998)	5, 7
Liner v. Jafco, Inc, 375 U.S. 301 (1964)	5
Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982)	10
Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992)	10, 11
New York, Chicago & St. Louis Ry. Co. v. Bucsi, 128 Ohio St. 134, 190 N.E. 2d 562 (1934)	9
Preseault v. ICC, 494 U.S. 1 (1990)	8
Roe v. Wade, 410 U.S. 113 (1973)	5
Sosna v. Iowa, 419 U.S. 393 (1975)	6
State ex rel Merritt v. Linzell, 163 Ohio St. 97, 126 N.E. 2d 53 (1955)	9
United States v. Munsingwear, Inc., 340 U.S. 36 (1950)	5
United States Constitution:	
Article III	5
Fifth Amendment	8, 14
Fourteenth Amendment	8, 14

Cited Authorities

Page

Other Authorities:

R.C. 711.24 ..... 4, 6, 8, 9, 14, 15

R.C. Chapter 711 ..... 6, 15

R.C. Chapter 2506 14

STATEMENT OF THE CASE

A. Statement Of Facts.

Petitioners' statement of the facts is incomplete and incorrect in several crucial ways. First, petitioners do not correctly describe the nature of an implied easement. They try to characterize it as if it were a fee simple ownership in the land. They argue that the channel excavated through Memorial Shoreway Drive abrogated such ownership. This is not correct. The fee simple interest in the roadway is owned by the respondent, Baycliffs Corporation ("Baycliffs"). Each of the petitioners actually have an implied easement in the *use* of the roadway to access their respective lots. It is the right to drive over the roadways as shown on the current plat as authorized by the Ottawa Regional Planning Commission (the "ORPC"). Each lot owner, dependent upon whether he or she drove clockwise or counterclockwise around the island, could reach his lot from *both* directions before the road cut. After the replat of Memorial Shoreway Drive, as set forth in the approved Baycliffs Subdivision, Phase I plat (the "Baycliffs Plat") and after the channel excavation, each lot owner still has the ability to reach his lot from both directions.

Second, petitioners omit the history of the subdivision platting on Johnson's Island because history is against them. Johnson's Island was first platted in 1895 with roadways dedicated to the public forever. Each of the five replats between 1895 and 1989 have vacated all or certain sections of the former dedicated roadways. Indeed, houses and lots owned by certain members of petitioners' class currently overlay the locations of vacated roadways. The point is clear. An implied easement of access does not equal fee simple ownership. If it did, title to many of petitioners' lots would be affected. As history shows, change is allowed under the statutory framework of the

replatting law, whether to accommodate more vehicular traffic, as when the causeway was built from the mainland in the mid 1970s, or for any of the other many reasons the Island has been replatted.

Third, petitioners incorrectly claim the preliminary subdivision plat filed in 1989 created 88 lots. This is not so. The preliminary plat proposed an overall plan to subdivide the entire 148 acres of undeveloped land on the Island. The preliminary platting process took one public meeting all by itself, which occurred before the three hearings involved in the final plat (88 lot) process. It is important to correct petitioners' misstatement because the two-part process leading up to the replat was in total an extensive, four-hearing, year long study of the vehicular traffic on Johnson's Island by the county-wide membership of the ORPC and its staff of experts. The process was one of careful scrutiny of vehicular safety, speed and volume, fire and ambulance access, construction timing, weather effect, roadway engineering and aesthetics for the Island as a whole. Such was the breadth and depth of the overall study that culminated in the Baycliffs Plat approval.

Fourth, petitioners' assertion that they did not have any notice of the ORPC's five hearings or an opportunity to present evidence is wrong. Members of the class and officials of the Johnson's Island Property Owners Association ("JIPOA") attended all five hearings in large numbers. They gave testimony against Baycliffs. They showed video tapes of the Island and had their attorney argue on their behalf. And they were influential. Baycliffs was denied approval after several of those meetings largely in response to the petitioners' objections. However, in the end, after all was heard, the testimony at the hearings had demonstrated as follows:

- The Insurance Services Office, Commercial Risk Service, which is the fire rating service in Ohio, designates all of Johnson's Island as Class 6. That means that even the farthest homes on Johnson's Island (before and after the road cut) are within five miles of the nearest fire station and that there is a draft point (fire hydrant or water source) within 1,000 feet of the dwellings.

- Based on the opinions of the local fire chief and the Insurance Services Office rating, all of Johnson's Island is adequately served by fire safety services now, and even if the road cut is made and a new road system is installed, the additional distance of travel of about .4 miles to those homes on the southeast corner is still well within their community standards and is not a hazard.

Accordingly, the ORPC approved the Baycliffs Plat. JIPOA and other petitioners filed a statutory appeal with the Ottawa County Court of Common Pleas (the "Trial Court"), but they did not file briefs and did not pursue it to conclusion, choosing instead to voluntarily dismiss it two months before filing the underlying case. However, all of the litigation held up the filing of the plat until August 8, 1995. Once filed, Baycliffs began construction, which took about 3 years to substantially complete. The new roads are built and petitioners drive over them every day. Other subdivision improvements, such as sanitary sewers, have been constructed. The channel excavation, as approved by the U.S. Army Corps of Engineers and a host of other Federal and State agencies, has been completed and boats have freely navigated the channel and docked at the quarry lagoon home sites since the Spring of 1998. Approximately 60 lots have been sold to private owners who either already dock their boats in the quarry lagoon or will do so in the near future. New homes are currently under construction and the final plat for Phase II has recently been approved by the ORPC for 28 new home sites.

B. The Underlying Proceedings.

The petitioners filed for declaratory and injunctive relief against Baycliffs and its predecessor in title, Johnson's Island, Inc. The petitioners requested the Trial Court to declare that their rights

> to the roadways shown on the Plat of Bay Haven Estates, created by the Plat and by their legal rights, can not be interfered with or terminated by [Baycliffs] and that [Baycliffs] have no authority to sever the platted roadway in Bay Haven Estates.

Petitioners did not plead any deprivation of a property right protected by either the United States or Ohio Constitutions. They also did not claim that R.C. 711.24 was unconstitutional and they did not serve a copy of the complaint on the Ohio Attorney General, which is a jurisdictional defect. Petitioners requested the Trial Court to enter judgment

> permanently enjoining [Baycliffs] from ever cutting or constructing a channel from Sandusky Bay to the interior of Johnson's Island which severs the platted roadways in Bay Haven Estates.

The Trial Court ruled in Baycliffs' favor, essentially ruling that petitioners should have pursued an appeal of the ORPC decision. The Court of Appeals for the Sixth Ohio Appellate District and the Supreme Court of Ohio both affirmed on the basis that Baycliffs properly altered Memorial Shoreway Drive though Ohio's statutory platting process.

REASONS FOR DENYING THE WRIT

I.

THE COURT SHOULD NOT GRANT A WRIT OF CERTIORARI AS PETITIONERS' CLAIMS ARE MOOT BECAUSE THE ACT SOUGHT TO BE ENJOINED HAS OCCURRED.

Article III of the United States Constitution requires the existence of a case or controversy in order for a federal court to exercise jurisdiction over a matter. *DeFunis v. Odegaard*, 416 U.S. 312 (1974), citing *Liner v. Jafco, Inc*, 375 U.S. 301, n.3 (1964). What is more, an actual controversy must exist at stages of appellate or certiorari review, and not simply at the date the action is initiated. *Id.* at 319, citing *Roe v. Wade*, 410 U.S. 113 (1973); *United States v. Munsingwear, Inc.*, 340 U.S. 36 (1950). In this case, the controversy between the parties has ceased to exist. Therefore, this Court need not determine the legal issues, since there is no order the Court could give that would affect the parties' rights with respect to the injunctive relief that was denied by the Trial Court, the Ohio Court of Appeals and the Ohio Supreme Court.

It is beyond dispute that a request for injunctive relief generally becomes moot upon the happening of the event sought to be enjoined. *Harris v. City of Houston*, 151 F.3d 186, 189 (5th Cir. 1998). Petitioners sought to enjoin the cutting of Memorial Shoreway Drive as shown on the Baycliffs Plat. They did not do so and a waterway now exists through Baycliffs' property where a 300-foot section of Memorial Shoreway Drive used to be. Petitioners' claims are therefore moot.

This Court has sometimes excepted class action suits from the mootness doctrine. However, as will be shown, the

circumstances in this case do not warrant such exception. First, in *Sosna v. Iowa*, 419 U.S. 393 (1975), this Court held that in a class action where the issue sought to be litigated would escape full appellate review on behalf of any single challenger, the case would not become moot just because the controversy is resolved as to the named plaintiff. *Sosna*, 419 U.S. at 399-400. This *Sosna* exception does not apply because the controversy has been resolved with respect to all the members of the class. This case as pleaded by petitioners concerns just one event that would affect all class members. That event — the excavation of a channel through Memorial Shoreway Drive — has occurred. The controversy as to all class members is over. The claims of the entire class are, therefore, moot.

Second, this Court has held that where the issue sought to be litigated was not one which would dissipate during the normal time required for resolution of the matter, the requirement of a live case and controversy would still apply. *Id.* This case is not one in which the issues, if they should arise again, are likely to dissipate before any single litigant could pursue them to full appellate review. As an initial matter, the possibility that the exact issues of this case could repeat themselves with respect to any member of petitioners' class seems virtually impossible since no more channels will be cut into the quarry lagoon. Arguably, the issues raised by petitioners concerning replatting of roadways generally under R.C. 711.24 and the effect, if any, such replatting may have on implied easement rights, could reoccur with respect to other improvement projects, such as a road widening or re-routing. Should such issues arise again, the process for replatting land under R.C. Chapter 711 and the attendant appeal process is not of such short duration that it would evade its own review.

The process for any replatting requires several steps, is quite lengthy, and has a statutory appeal process. Initially, the

new plat must be engineered and drawn, depicting the proposed changes. Once the new plat is created, it must be submitted to a county or regional planning commission for approval. Any lot owner injuriously affected by the proposed alteration must be notified in order to obtain the lot owner's consent to the new plat. The planning commission must hold public hearings in consideration of the new plat. If the planning commission finds that the plat does not comply with the rules and regulations for plats and subdivisions, then the commission may require the landowner to alter the plat and resubmit it. There may be numerous plat re-submissions, extending the statutory process. Once the planning commission gives its approval, the plat must be signed by all approving officers, such as the road engineer and the sanitary engineer, and it must also be signed by all approving agencies and then properly recorded. Even after the planning commission issues a final decision approving or rejecting the plat, the decision, under this statute, is subject to judicial review. Therefore, should issues similar to those that petitioners seek to bring before this Court occur again, the parties involved will have adequate time for full review.

Also, petitioners sought only one specific remedy relative to the excavation through Memorial Shoreway Drive — injunctive relief. Because such remedy is no longer available, the case is moot. *Harris v. City of Houston*, *supra*, 151 F.3d at 191. Petitioners did not claim compensatory damages for any alleged "taking" of their claimed constitutionally-protected property interests in Memorial Shoreway Drive, so there are no damage claims surviving the denial of injunctive relief to keep the suit alive. Further, the Court may not now grant the petitioners any remedy which was not previously requested in their complaint for relief. *Arizonans for Official English v. Arizona*, 520 U.S. 43 (1997); *Harris*, 151 F.3d at 190-91. Therefore, not only is the event over, correspondingly, the remedy is not available and this case is moot.

II.

THIS COURT SHOULD NOT GRANT A WRIT OF CERTIORARI BECAUSE THE STATE DID NOT DEFINE AWAY OR OTHERWISE DEPRIVE PETITIONERS OF PROPERTY RIGHTS PROTECTED UNDER THE FIFTH AND FOURTEENTH AMENDMENTS.

As petitioners concede, in determining whether a taking has occurred, courts should bear in mind that

> property interests . . . are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law.

Preseault v. ICC, 494 U.S. 1, 20 (1990).

Petitioners' contention that their implied easement rights have somehow been defined away by the courts' construction of R.C. 711.24 in this case is erroneous. Because petitioners' implied easement rights are defined by existing rules and understandings found in state laws such as R.C. 711.24, state common law and in other understandings, they cannot argue that the Ohio courts' recent holdings that their implied easement rights could be altered under R.C. 711.24 takes away any property interests they previously possessed.

From the beginning, petitioners' implied easement rights have been subject to the procedures in R.C. 711.24. That section — which was in effect at the time the Bay-Haven Estates plat was recorded and has not since been amended — establishes a procedure pursuant to which a previously recorded plat containing lots and roadways may be altered, thereby affecting

the future use of those roads.[1] Thus, petitioners bought their properties on Johnson's Island knowing that the roadways depicted on the Bay-Haven Estates plat could be altered to accommodate future development.

R.C. 711.24 is harmonious with established Ohio common law that a property owner does not sustain a cognizable legal injury as a result of the alteration of a roadway which results in mere circuity of travel, *see State ex rel Merritt v. Linzell*, 163 Ohio St. 97, 126 N.E. 2d 53, 56 (1955) citing *New York, Chicago & St. Louis Ry. Co. v. Bucsi*, 128 Ohio St. 134, 190 N.E. 2d 562 (1934), where the alteration does not abrogate a property owner's rights of ingress to and egress from his or her property. *Eastland Woods v. Tallmadge*, 2 Ohio St. 3d 185, 443 N.E. 2d 972 (1983); *see also Cleveland v. Shaker Heights*, 30 Ohio St. 3d 49, 507 N.E. 2d 323 (1987). Thus, any rights that petitioners have in Memorial Shoreway Drive extend merely to use that roadway for access to their respective lots; they have no right to enjoin an alteration of that implied right nor to sue for damages that may be sustained as a result of the change in the roadway's location.

Additionally, on three prior occasions when Memorial Shoreway Drive was altered from its originally platted position, the re-routing of the road was not contested as a taking of property interests. These earlier alterations to petitioners' implied easement rights should be viewed as understandings

---

1. This right to alter a platted roadway is consistent with the Ohio common law principle that the owner of land subject to an implied easement "may move such right of way at his convenience so long as such access shall be as reasonably convenient to the dominant land as the one then in existence." *A.S.D. Securities, Inc. v. J.H. Bellows Co.*, 48 Ohio App. 101, 192 N.E. 472, at par. 3 of syllabus (Ottawa 1933); *Cookston v. Box*, 109 Ohio App. 531, 540, 160 N.E. 2d 327, 333 (Cuyahoga 1959).

that define the dimensions of those rights to be adaptable in order to allow for development and improvements. Indeed, petitioners' implied easement rights in which they claim they have such a vested, compensable interest do not even consist of the same right-of-ways petitioners had when they were originally granted those implied rights. This most recent alteration of petitioners' easement constitutes a re-defining of their interests, but not a defining away of those interests. Since petitioners still each have the ability to reach their individual property from both directions, there has been no diminishment of the "bundle of rights" they had prior to the approval of the Baycliffs Plat. To the extent each property owner now has the right to drive over a more enhanced roadway system on the Island, those implied easement interests have been expanded. To the extent that only 20 or so landowners on the southeast corner of the island have an increased travel route to their lots of about .4 mile, there is, at the most, a slight additional circuity, which is merely a de minimus alteration to such access. And, of course, since no member of petitioners' class abuts the altered section of the roadway, there has been no actual legal injury recognized in Ohio.

While there is no set formula for determining whether compensation is constitutionally due for government regulation of property, this Court has identified some factors to be considered. Such factors include: (1) the economic impact — deprivation of all economically beneficial use; (2) interference with investment-backed expectations; and (3) extent to which the interference with the property right constitutes a permanent physical occupation of the property. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1015 (1992); *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426 (1982). None of these factors indicate that petitioners have suffered a compensable taking.

First, petitioners have not suffered any economic impact by having their easement routes shifted to a new location. Their easement interest in the roadway was not intended to confer economic benefits, but rather was intended to provide the practical benefit of access to their lots. There was no economic advantage to using Memorial Shoreway Drive, nor is there any economic disadvantage to using the newly constructed roadways. Because there was no economic purpose to petitioners' implied easement right, they cannot claim to be deprived of an economically beneficial use.

Second, the factor of investment-backed expectations is not present in this case in the manner it has been in other takings cases considered by this Court. For example, in *Lucas*, the petitioner purchased fee simple title to the property with an investment plan to build single-family homes. The regulation at issue in that case completely negated the petitioner's plans. The investment expectations in *Lucas* are very unlike the petitioners' implied easement to access their lots. In fact, to examine expectancies, it is arguable that when petitioners made the choice to purchase lots in an area undergoing development, they expected the surrounding area to continue to be developed in a manner that would actually increase their property values. Indeed, the general development plan of the island since the 1950's has included the excavation of a channel into the quarry lagoon for boat dockage. The changes effected by the Baycliffs Plat are therefore actually consistent with any expectations, investment or otherwise, that petitioners may have had.

Third, the nature of petitioners' implied easement rights in currently platted roads is not that of a tangible, fixed interest in a specific parcel of property. None of the members of petitioners' class had exclusive rights to the use of Memorial Shoreway Drive. Rather, the implied easement right to use the roadway was a common interest shared in use by all lot owners

in Bay Haven Estates and their guests, yet there was no physical interference with any one lot owner's ability to use his easement right to its fullest extent. Even now, with a channel running through Memorial Shoreway Drive, all of the lot owners have the ability to exercise their easement rights to the fullest extent because access to their homes has not been subjected to physical interference. In short, it cannot be said that petitioners have suffered any recognized legal harm to their property interests and therefore, this Court should not grant a writ of certiorari to entertain their action.

III.

THIS COURT SHOULD NOT GRANT A WRIT OF CERTIORARI BECAUSE THE OHIO STATE COURTS AND STATUTES INVOLVED IN THIS LAND-USE DECISION PROVIDED PETITIONERS APPROPRIATE DUE PROCESS PROTECTIONS.

The circumstances of this case do not warrant this Court's review where the land-use dispute at issue has been reviewed by three different levels of state courts, all of whom found the ORPC's land-use decision to be proper. Moreover, guidance on the due process protections is not necessary here because the state did in fact provide petitioners with essential due process protections.[2]

---

2. In bringing this land-use dispute to the attention of this Court for the asserted purpose of prompting the Court to provide guidance to state courts regarding due process protections in the context of land use decisions, petitioners overlook the fact that land-use disputes are regarded as an "intensely local area of the law." *Gardner v. City of Baltimore Mayor and City Council*, 969 F.2d 63 (4th Cir. 1992). Due to the local nature of land-use disputes that constantly arise among developers, local residents, and local officials, federal courts have recognized that in most instances, decisions regarding the application of subdivision regulations,

(Cont'd)

> The requirements of procedural due process apply only to the deprivation of interests encompassed by the Fourteenth Amendment's protection of liberty and property . . . [b]ut the range of interests protected by procedural due process is not infinite.

Board of Regents of State Colleges v. David F. Roth, 408 U.S. 564, 569 (1972). In those situations where due process protections apply, the essential requirements are notice and an opportunity to respond prior to any infringement of the protected interests. *Cleveland Bd. of Edn. v. Loudermill*, 470 U.S. 532, 546 (1985).

While the requirement of an opportunity to respond usually connotes some form of a hearing, it does not have to include full adjudication including presentation of witnesses and cross-examination in every case in which a prior hearing is required. *Arnett v. Kennedy, et al.*, 416 U.S. 134, 163-64, 200 (1974). Instead, the formality and procedural requisites for a hearing can vary, depending upon the importance of the interests involved and the nature of the subsequent proceedings. *Board of Regents of State Colleges v. Roth*, 408 U.S. at 570, n. 8.

Petitioners claim that they were denied due process of law because they were afforded neither notice of nor an opportunity to be heard on Baycliffs' proposed alteration of Memorial Shoreway Drive. As stated previously, this is simply incorrect. As a further illustration of the petitioners' actual notice, a number of the petitioners, including JIPOA, filed a lawsuit *prior*

(Cont'd)
zoning ordinances, and other local land-use controls properly rest with the community that is ultimately, and intimately, affected. *Id.* Accordingly, when faced with local land-use disputes, federal courts should be extremely reluctant to upset the delicate political balance at play in local land-use disputes. *Id.*

to the first hearing on the Baycliffs Plat in an unsuccessful effort to enjoin the ORPC from even considering the Baycliffs Plat.

These circumstances obviate petitioners' argument that they have suffered a deprivation of their due process rights. Given the substance of petitioners' interests in the proposed plat changes — which were limited to their implied easement rights to use Memorial Shoreway Drive, and involved neither fee simple ownership rights nor an impairment of their right of ingress to and egress from any one of their properties — the public hearings that they attended satisfied the prior hearing requirement contemplated by the Fifth and Fourteenth Amendment due process protections.

Petitioners also assert a "facial invalidity" argument by contending that the procedures of R.C. 711.24 do not adequately protect the due process rights of all Ohioans guaranteed by the Fifth and Fourteenth Amendments. R.C. 711.24 not only contains specific notice requirements, it also requires that any roadway alteration occur within the context of the statutory platting framework — that is, upon application to and after public hearing conducted by the appropriate planning commission.

A finding of appropriate due process safeguards within the procedures of R.C. 711.24 is supported even more by the fact that subsequent to the plat approval procedures conducted under R.C. 711.24, any party adversely affected by the ORPC's decision can seek judicial review of the decision under the administrative appeal remedy provided in R.C. Chapter 2506. This opportunity to be heard on administrative appeal, of which petitioners' availed themselves, provided an additional safeguard to petitioners' due process rights. Petitioners, having participated in the many legal proceedings that both preceded and followed the ORPC's approval of the Baycliffs Plat, as

well as the administrative proceedings themselves, cannot advance this lack of due process argument because they themselves do not fall within its purview.

It is evident from the foregoing that in this instance the state courts properly found that all essential due process protections were safeguarded both through the statutory procedures called for under R.C. Chapter 711 and through the actual actions of the ORPC. Both under the terms of R.C. 711.24 and as the events in this case actually occurred, the due process requirements of notice and the opportunity to be heard were satisfied. Accordingly, this court should deny the petition for writ of certiorari.

CONCLUSION

For the foregoing reasons, respondent Baycliffs Corporation requests that this Court overrule the petitioners' petition for a writ of certiorari and let stand the unanimous decisions of the Ottawa County Court of Common Pleas, the Court of Appeals for the Sixth Ohio Appellate District and the Ohio Supreme Court.

Respectfully submitted,

JOHN D. BROWN
Counsel of Record
ROBERT A. BRINDZA
MICHELLE ARENDT
KELLEY, McCANN
& LIVINGSTONE, LLP
Attorneys for Respondents
Baycliffs Corporation
and Johnson's Island, Inc.
3500 BP Tower
200 Public Square
Cleveland, Ohio 44114-2302
(216) 241-3141